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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946.

Nos. 321- 322

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ARMOUR PLANT EMPLOYEES CREDIT UNION, A CORPORATION,

Respondent.

JOHN H. CHATZ, TRUSTEE IN BANKRUPTCY OF HOWARD HABERMAN, DOING BUSINESS AS THE CLUB STORE AND MORTON CLOTHIERS, BANKRUPT,

Petitioner,

vs.

ANDREW A. TODD, CHELSEY H. TALLEY AND ARMOUR PLANT EMPLOYEES SERVICE BUREAU, A CORPORATION,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Of Counsel.

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Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Your petitioner, John H. Chatz, as Trustee in Bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, Bankrupt, prays that writs

of certiorari issue to review the judgments of the Circuit Court of Appeals for the Seventh Circuit entered in the above causes, reversing, with directions to dismiss the petitioner's action, the judgment of the United States District Court for the Northern District of Illinois for a total of $105,851.58 for the petitioner and against respondents, based on findings in a trial by the Court without a jury.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (R. 1941-1956) and the dissenting opinion of Judge Major (R. 1956) are reported in 154 F. (2d) 236. The District Court made extensive findings of fact (R. 1598-1616) and conclusions of law (R. 1617-1621), but rendered no opinion.

JURISDICTIONAL STATEMENT.

Jurisdiction is conferred by section 240, of the Judicial Code, as amended by the Act of February 13, 1925 (U. S. C. Tit. 28, sec. 347 (a)).

The judgments of the Circuit Court of Appeals sought to be reviewed were entered on February 23, 1946 (R. 1956). On March 9, 1946, within the 15 days permitted by its rules, petitioner filed a petition for rehearing (R. 1957) to which respondents filed their answer (R. 2011). On April 24, 1946, the Circuit Court of Appeals entered its orders modifying its opinion and denying the petition for rehearing (R. 2049). This petition is filed within three months thereafter as permitted by Act of February 13, 1925, ch. 229, sec. 8, 43 Stat. 940 (U. S. C. Tit. 28, sec. 350), and *Bowman* v. *Loperena*, 311 U. S. 262, 266; *Pfister* v. *Northern Illinois Finance Corp.*, 317 U. S. 144; and *Gypsy Oil Co.* v. *Escoe*, 275 U. S. 498.

QUESTIONS PRESENTED.

1. Does Rule 52(a) of the Federal Rules of Civil Procedure, in appeals substituted by statute for writs of error, supersede sections 875, 879, 773 and 861(b), Tit. 28, U. S. C., which on such appeals prohibit reversals for errors in fact, giving the effect of a jury's verdict to the findings of a trial court in a trial to the court without a jury, and limit review to whether special findings of fact support the judgment?

2. Does Rule 52(a), independently of such statutes, permit the Circuit Court of Appeals to set aside special findings of the District Court in a civil action when supported by evidence?

3. Does Rule 52(a) permit a Circuit Court of Appeals, on review of a civil action, to consider as impeached the testimony of a witness whom the District Court did not in the trial before it consider impeached, to disregard other substantial testimony in the record of the same witness, to disregard corroborative testimony, to give the effect of evidence to extra-judicial allegedly contradictory impeaching statements of the witness, to weigh conflicting evidence and to draw inferences contrary to those which the trial court might reasonably draw?

4. Did the bankrupt's submission to the payment of the collections on his accounts to the Credit Union, to liquidate its loans on which he was not liable as guarantor or co-maker, because of respondents' threats that the Service Bureau would not collect out of wage deductions the Bankrupt's installments accounts accepted for collection that were owing by Armour employees and that, if he attempted to effect collections on his accounts by means of his wage assignments, they would interfere with that and thereby stall collections from coming to him for a

month or six weeks or two months so that he could not pay his creditors and would be out of business and would have to go into bankruptcy unless this be done, constitute duress under the laws of the state of Illinois?

5. May the Circuit Court of Appeals reverse a judgment in its entirety with directions to dismiss an action when there are findings, other than the finding set aside, which will support the judgment in whole or in part?

6. Were the findings of the District Court "clearly erroneous" within the meaning of Rule 52(a)?

STATUTES INVOLVED.

The statutes involved are U. S. C., Title 28, sections 225a (Act of February 13, 1925, ch. 229, 43 Stat. 936, amending Judicial Code sec. 128), section 723b and 723c (sections 1 and 2 of Act of June 19, 1934, ch. 651, 48 Stat. 1064), section 730 (Rev. Stat. section 917), section 773 (Act of May 29, 1930, ch. 357, 46 Stat. 486, amending Rev. Stat. section 649), section 861a (Act of January 31, 1928, section 1, ch. 14, 45 Stat. 54), section 861b (Act of April 26, 1928, ch. 440, 45 Stat. 466, amending section 2 of Act of January 31, 1928), section 875 (Rev. Stat. 700), and section 879 (Rev. Stat. section 1011 as amended by Act of February 18, 1875, ch. 80, 18 Stat. 318. Also Act of March 3, 1891, ch. 517, 26 Stat. 826, and Rule 52(a) of the Federal Rules of Civil Procedure.

The pertinent provisions are set forth in the Appendix at pages 26-29.

SUMMARY OF THE MATTER INVOLVED.

Petitioner is the trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, bankrupt, having been appointed after the bankrupt's adjudication as such after his failure to effect an arrangement with his creditors under Chapter XI of the Bankruptcy Act.

Petitioner brought a plenary suit in the District Court for the Northern District of Illinois against the respondents, Armour Plant Employees Credit Union, a corporation (herein called "Credit Union" for convenience), Armour Plant Employees Service Bureau, a corporation (herein called "Service Bureau" for convenience), Andrew A. Todd and Chelsey H. Talley, who were directors and officers of both corporations. Petitioner's complaint (R. 2) as amended (R. 1576) to conform to the proof, was an action for only a money judgment and interest against the respondents, and prior to the Federal Rules of Civil Procedure, would have been an action at law.

Recovery was had in the District Court against the Credit Union and the Service Bureau for the $43,297.14 of moneys diverted to payments to the Credit Union under duress and without consideration, the bankrupt not being obligated in any manner for such payments to the Credit Union, which together with $17,362.23 of statutory interest for vexatious delay aggregated $60,659.37.

Recovery was had against the Service Bureau, Todd and Talley for an additional $45,192.21, covering four items, namely the $16,945.53 of continued extra charges deducted after March 1, 1935, pursuant to an agreement to reinstate laid-off employees in Armour's employ and on its payrolls, which agreement was not thereafter performed despite requests; for false and fraudulent collection charges

of $10,076.75 collected from the bankrupt out of proceeds of loans of the Credit Union falsely listed with Armour & Company as collections by the Service Bureau; for the $13,236.64 of moneys admittedly collected after October 1, 1938 on bankrupt's then outstanding accounts not assigned to the respondents; and for the $8,335.32 difference between the cash paid to the bankrupt and the amounts of accounts receivables on sales made after October 1, 1938 discounted with the respondents, whereby they were paying back to the bankrupt only the proceeds of the collections of his own accounts falsely claimed to have been assigned. With statutory interest added thereto and after credit to Todd and Talley for unpaid advances and loans, $45,192.21 was adjudged due from them and the Service Bureau to petitioner.

After a trial lasting five weeks before the Court without a jury (R. 1598), the Court made special findings of fact and entered judgment for petitioner for $60,659.37 against both the Credit Union and the Service Bureau, and for an additional $45,192.21 against Todd, Talley and the Service Bureau (R. 1621). The Circuit Court of Appeals (by a divided court) reversed with directions to dismiss the action.

The bankrupt, Howard Haberman, early in 1934 opened up his own installment credit retail men's ready-made clothing business in Chicago, Illinois, in the vicinity of the plants of Armour & Company, whose employees comprised the greater part of his customers.

The respondents, Todd, Talley and the Service Bureau, were engaged in the business of collecting accounts against Armour & Company employees out of weekly wage deductions made by pre-arrangements with Armour & Company, for which they charged 10% of the collections. For an additional consideration of 10% (later 12½% and 15%) of collections they would agree to have employees reinstated in

Armour's employ and on its payroll, thereby assuring payment in full of the accounts out of continued earnings (R. 106, 109, 110, 1327-8, 1355-6, 323-4, 625-6).

Haberman and the respondents agreed to this arrangement for Haberman's business (R. 110); and for over a year both parties performed, Haberman paying the charges for both services totaling 20%, 22½% and finally 25%, and the respondents procuring the reemployment of many employees (R. 126, 176, 184, 198, 1323, 1358-9).

Also at this time, and to increase the loan business of the Armour Plant Employees Credit Union, Todd and Talley arranged that the Credit Union would make loans to acceptable Armour employees and pay their proceeds to Haberman in payment of the employees' clothing purchases (R. 131), which would in effect be cash sales (R. 1360). Haberman did not guarantee these loans and was not a comaker (R. 209, 1369, 1370) (Finding 28, R. 1606).

When early in 1935 Armour & Company laid off many employees, collections out of wages dropped severely both on Haberman's credit accounts and on the Credit Union's loans. The Credit Union had some $50,000.00 of such accounts then outstanding (R. 152).

Todd and Talley then insisted on applying collections on Haberman's accounts against the Credit Union's delinquent loans. Haberman remonstrated and told Todd if that were done, he would have no funds with which to continue business and would be bankrupt. He demanded they fulfill their reemployment agreement for which they had been paid and what did they expect to do for that money. The response was if he did not stop talking about the deductions from his collections they would cut him off, by which they told him they meant they would not collect his accounts, interfere with his own efforts to effect collections on wage assignments and stall collections from coming to him for a month

or two so that he couldn't pay his creditors and would have to go into bankruptcy (R. 165, 174-5).

"Q. Did Mr. Todd ask you (Haberman) at that time to have the collection of accounts receivable which the Service Bureau then had and which the Service Bureau would get in the future on new sales, both to be used for the payment of these defaulted Credit Union loans?

A. Yes, he did * * * I told Mr. Todd that—in this conversation I told him, well, it looked like he had me and if this is the way he wanted to treat me there was nothing I could do but submit to it.

Q. And did you submit?

A. I did" (R. 166).

The Circuit Court quoted other testimony of the bankrupt (R. 151-2) that when Todd again said they wanted to make deductions out of the Bureau checks to pay the Credit Union and he objected that he hadn't guaranteed those accounts and they were going to keep his money for them and he wouldn't have any money left, Todd said:

"If you object to any of the things we want to do, we are going to cut you off. We will interfere with the collections of your Service Bureau accounts. If you serve any wage assignments down here, we will see to it that we will not hold up these checks. We intend to make you pay for the Credit Union loans" (R. 151).

The Court further quoted that Haberman said he wouldn't have any money for continuing his business to which Todd stated he'd talk with Talley and arrange a large loan and that the next day they presented Haberman with an assignment to Todd and Talley in blank of all his accounts outstanding as of that date in 1935 (Def. Ex. 69; R. 1922), and demanded that if he didn't sign it, they wouldn't give him any money and would be through with him (R. 152) (Finding 30, R. 1607).

The loan was one of $3,000.00 for which the bankrupt gave them his note for $6,000.00 (R. 284). Todd said he was

going to use the difference to pay on the Credit Union defaulted loans (R. 285) although there is no evidence he did. No loans were made thereafter until January, 1936 (R. 286, 288). This the Court below disregarded.

The record discloses that the loan transactions for the entire year of 1935, were as follows: In March, 1935, Todd and Talley twice made cash loans to the bankrupt aggregating $11,292.50 for which they took his notes aggregating $13,678.00 (R. 278). Although no money was paid him, Haberman's note balance in April, 1935, was increased by $1,458.27 for payments allegedly applied by Todd in payment to the Credit Union accounts (R. 280-1). After the addition of interest and credit for payments the note balance was $13,969.41 (R. 283, Pl. Ex. 37, R. 1835). With the addition of the foregoing $6,000.00 note, the note balance became $19,969.41 (R. 264, 284). In August, 1935, it stood at $18,701.76 on which $43.15, at the usurious rate of 12% per annum, was paid monthly as interest (R. 286-7). The balance remained constant until April, 1936 (R. 288), except for a loan made in January, 1936, and paid (R. 288).

On August 16, 1936, bankrupt executed an authorization (R. 1526A) for the deduction of 40% of his collections to be applied against delinquent "M" accounts in the Credit Union, until paid in full with interest. The bankrupt testified no consideration was given to him at the time (R. 436). Todd confesses to a lack of memory (R. 581-2) and Talley testifies it was Haberman's good will gesture (R. 750). Yet the next day Haberman gave them his two signed blank notes, undated, with no amounts and authorizing a confession of judgment against him (R. 290).

With the deductions being made, the bankrupt was pressed for funds, and doubtless to enable the Credit Union to tide over the period required to effect collections from the bankrupt's accounts, Todd and Talley in 1936 and 1937 made usurious loans with cash advances in amounts sub-

stantially less than the amounts of the notes, on which actual advances the interest rate was about 22% (Finding 32, R. 1608).

The total amount deducted from the bankrupt's accounts and paid to the Credit Union was $43,297.14 (Finding 29, R. 1606).

Although no longer performing their reemployment agreement, Todd and Talley continued to deduct the extra charge therefor from collections, meeting objection with a threat to cut the bankrupt off (R. 174-5, 1378-9, 1412). The aggregate of the deducted unearned charges from March 1, 1935 was $16,945.53 (Finding 23, 24, R. 1604).

By October 1, 1938, the Credit Union loans had been liquidated. Despite previous assurance of waiting until then to adjust matters, Todd and Talley imposed a new arrangement upon the bankrupt, which they pleaded, by way of settlement as a defense (R. 45, 46), but failed to maintain (R. 1608-9; 1618). At that time Haberman had $50,-235.57 of Armour employee accounts at the Service Bureau for collection and some $40,000.00 additional accounts from other customers. The respondents claimed (R. 858) ownership of all by virtue of the assignment made in 1935 (which expressly assigned only accounts as of that earlier date and did not include subsequent accounts). They demanded of the bankrupt he give them his note for $10,670.00, at which they valued the non-Armour accounts then claimed, stating they would cancel all of his other note indebtedness to them, that as to any new accounts for sales made thereafter to customers, they would discount them at 65% but would pay him therefor weekly only an amount equal to the collections from the old accounts. They also insisted that Mr. Packer, their auditor, be in the bankrupt's store and that the bankrupt's auditor be, and he was, discharged. The bankrupt's notes were never cancelled or surrendered to him by the respondents, and instead have been sued on in their counter-

claim. All evidences of the customer's indebtedness, namely, notes and wage assignments, were at all times in the bankrupt's possession and premises and were turned over to the petitioner as his Trustee in Bankruptcy (R. 1608-10).

The bankrupt could not function under such a situation and attempted, despite threats (R. 237-8) of jail and accusations of criminal violations, to discount the accounts and new accounts claimed by the respondents to have been assigned to them. With the situation becoming desperate within the next two months, bankrupt consulted an attorney whom he advised of all the facts as he testified to, but who, under the pressure of haste and within the limited time available (R. 392), prepared a complaint (R. 1851-67) to recover in excess of $85,000.00 predicated on the theory that all deductions by respondents were without consideration and were disguised charges for loans and recoverable usury. A meeting with the respondents was held and a copy of the proposed complaint delivered to them. Within a few days (in January, 1939) the respondents met with the bankrupt and proposed to him that if he would dismiss his counsel and would execute a retraction in the form which they presented, they would pay his creditors in full (R. 240) at the rate of $1,000.00 a month (R. 298) and enter into a new business with him of which he would have one-third of the profits (R. 240-1). Upon this assurance, the bankrupt signed the retraction telling respondents that he signed it knowing it to be false and that they knew such also to be the case (R. 240, 242).

After five months of payments to bankrupt's creditors, the respondents discontinued, telling the bankrupt that he should settle with his creditors and have them reduce their claims (R. 299). The bankrupt, thereupon, in July, 1939, instituted proceedings under Chapter XI, and after failure (R. 300) of the arrangement negotiations was adjudicated

bankrupt. Petitioner was appointed Trustee in Bankruptcy.

Petitioner instituted this plenary suit in the District Court and obtained a judgment against the respondents who filed separate appeals to the Circuit Court of Appeals for the Seventh Circuit, with the result as above stated.

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The scope of the review on appeals, substituted by statute for writs of error, from judgments based on findings of trial courts in trials without a jury in civil actions, which but for the Federal Rules of Civil Procedure would be actions at law, involves the interpretation of Rule 52 (a) and conflicting statutes governing relief on such appeals, and is an important question not heretofore determined by this Court, and should be.

2. The interpretation and application of Rule 52(a) by the Circuit Court of Appeals below is in conflict with the decisions of Circuit Courts of Appeals for other circuits.

3. The Circuit Court of Appeals has decided a question of the Illinois law of duress in conflict with applicable local decisions.

4. The Circuit Court of Appeals has so far departed from the accepted or usual course of judicial proceedings as to call for an exercise of this Court's powers of supervision.

WHEREFORE, it is prayed that writs of certiorari to the Circuit Court of Appeals for the Seventh Circuit should be granted to the end that these causes may be reviewed and determined by this Honorable Court and that the judgments of the United States Circuit Court of Appeals for the Seventh Circuit may be reversed, and that your

petitioner may have such other and further relief as may be meet and just.

JOHN H. CHATZ, trustee in bankruptcy of Howard Haberman, doing business as The Club Store and Morton Clothiers, Bankrupt,

Petitioner,

By JOSEPH ROSENBAUM,

Counsel for Petitioner.

HARRY H. RUSKIN,
JEROME S. WALD,
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Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

STATEMENT OF THE CASE.

The reference to the opinion of the Court below and the material facts as to the origin and history of the case, jurisdiction and the issues presented have been stated in the preceding Petition.

SPECIFICATION OF ERRORS TO BE URGED.

(1) The Circuit Court of Appeals erred in reversing the judgment of the District Court with directions to dismiss Petitioner's action.

(2) The Circuit Court of Appeals erred in not affirming the judgment of the District Court, or, in the alternative, erred in not reversing the judgment of the District Court in so far as it includes allowances for interest and in not affirming the findings of the trial court and the judgment in all other respects.

ARGUMENT.

(A) The Scope of the Review on Appeals, Substituted by Statute for Writs of Error, from Judgments Based on Findings of Trial Courts in Trials Without a Jury in Civil Actions, Which But for the Federal Rules of Civil Procedure Would Be Actions at Law, Involves the Interpretation of Rule 52(a) and Conflicting Statutes Governing Relief on Such Appeals, and Is an Important Question Not Heretofore Determined by This Court, and Should Be.

The limited scope of a writ of error, including the limitations and prohibitions of U.S.C., Tit. 28, sections 875 and 879, still exists in appeals substituted therefor by sections 861a and 861b.

The Circuit Courts of Appeals are directed, by section 879, *not* to reverse for errors in fact; and by section 875, the District Courts' findings are given the effect of a jury's verdict, except that (as in this case) where there are special findings of fact, the Circuit Courts are authorized to determine whether they support the judgment.

State Farm Ins. Co. v. *Coughran,* 303 U. S. 485; *Stanley* v. *Supervisors of Albany,* 121 U. S. 535, 547. The original statute (Act of March 3, 1865, Ch. 86, 13 Stat. 501; R. S. Secs. 649, 700), so codified, was essential for appellate review in non-jury law cases, as, prior to that time, trials by a District Court without a jury were not judicial acts, but only arbitrations and, the findings, therefore, not reviewable (*Campbell* v. *Boyreau,* 21 How. 223, 226-7).

The Circuit Court of Appeals below, however, ridding itself of this restraint by its definition of "clearly erroneous" in Rule 52(a) of the Federal Rules of Civil Procedure, reversed for errors in fact in passing on the sufficiency and weight of the evidence.

The Rules, as provided in Rule 1, only "cover the procedure in the District Courts of the United States * * *." They are authorized by Section 723c of Title 28, U. S. C., which permitted this court to "unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both." The rules prescribed for cases in equity are authorized by Section 730 and those "in actions at law" by Section 723b, Title 28, U.S.C., which permit such rules *only for the District Courts;* and it is only such rules of which Section 723c authorized a union.

May rule 52(a), prescribed for the District Courts, supersede the Acts of Congress which limit the right of the Circuit Courts of Appeals to review, and the scope of the review in such courts of, appeals substituted for writs of error? This question has never been judicially determined and is one of such vital importance as to justify this Court's assumption of jurisdiction to establish incontrovertibly the limit and scope of Federal Appellate jurisdiction and practice. Compare: *Leishman* v. *Associated Wholesale Electric Co.,* 318 U. S. 203, 205.

(B) The Interpretation and Application of Rule 52(a) by the Circuit Court of Appeals Below Is in Conflict with the Decisions of Circuit Courts of Appeals for Other Circuits.

The Circuit Court of Appeals below, by weighing the evidence and passing upon the credibility of the witnesses under the authority of Rule 52(a) as defined by it, acted in conflict with the decisions in other Circuits, which, under the same Rule, permit only a review of whether there be evidence to support the findings. See: in the Fifth Circuit, *Richardson* v. *U. S.*, 145 F. (2d) 764; *U. S. Guarantee Co.* v. *Colonial Oil Co.*, 145 F. (2d) 496, 500, and *Ake* v. *Chancey*, 149 F. (2d) 310; in the Tenth Circuit, *Kansas City Public Service Co.* v. *McMullin*, 142 F. (2d) 116, and *Federal Deposit Insurance Corp.* v. *Deaton*, 105 F. (2d) 677; and in the Third Circuit, *Floridin Co.* v. *Attapulgus Clay Co.*, 125 F. (2d) 669, 670, and *Plack* v. *Baumer*, 121 F. (2d) 676, 678, Compare: *Corbett* v. *Halliwell*, 123 F. (2d) 331, in the Second Circuit.

That the majority of the court below exceeded such limit in its review is clearly revealed by the dissenting opinion (R. 1956) that, "if this court were the trier of the facts, I would agree with the persuasive reasoning of the opinion that the case should be decided against the plaintiff. *I am unconvinced, however, that the findings of the trial court are without substantial support.*" (Italics ours.)

(C) The Circuit Court of Appeals Has Decided a Question of the Illinois Law of Duress in Conflict with Applicable Local Decisions.

The court below obviously misapplied the local law of Illinois, in which state all of the transactions between the bankrupt and the respondents had occurred. *Bryant* v. *Swafford Bros.*, 214 U. S. 279, 290-1; *Security Warehousing Co.* v. *Hand*, 206 U. S. 415, 423.

The only citations relied on by the Circuit Court were of Federal cases. The law of Illinois on the subject of actionable duress is clearly stated and applied in *Pemberton* v. *Williams*, 87 Ill. 15, 18; *Illinois Merchants Trust Co.* v. *Harvey*, 335 Ill. 284, 289-90; *Slade* v. *Slade*, 310 Ill. App. 77; *Rees* v. *Schmits*, 164 Ill. App. 250; *Cook* v. *Wolf*, 296 Ill. 27, 39; *Harris* v. *Flack*, 289 Ill. 222, and *Pittsburgh Steel Co.* v. *Hollingshead & Blei*, 202 Ill. App. 177.

Bankrupt was in no way liable to the Credit Union for the funds it had loaned to its respective members. The collections of his accounts were paid to the Credit Union over his objection and upon threats which the respondents had no right to make or enforce. They had no right to interfere with his independent collection from the employer on wage assignments. Realizing that resistance to the respondents' demands would lead only to his bankruptcy, Haberman submitted, objecting throughout the time. Loan of moneys relied on by the Court below could not negative the existence of duress. The only loan of money which the respondents could have made for the assignment in June, 1935, was actually a note for $6,000 for which only $3,000 was paid to the Bankrupt. It was represented that the balance would be paid to the Credit Union, although the evidence does not show that the respondents ever did. Loans could not have been offered or bargained for as consideration for the payments to the Credit Union, as none were made thereafter for some seven months.

Resistance at any time risked bankruptcy. When Haberman, in desperation, was finally obliged to engage an attorney, and respondents warded off suit by making periodic payments to his creditors, bankruptcy followed within two weeks after they ceased such payments.

Obviously the trial court and the dissenting judge were of the view that under the law of Illinois there was duress, and this court should not permit the majority view to bring confusion into the state of the Illinois law on the subject.

(D) The Circuit Court of Appeals Has So Far Departed from the Accepted or Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

1. On the duress, the Court below singled out only finding 46 and the written authorization of August 16, 1935, quoted at length the bankrupt's testimony as it appeared on pages 151-2 of the transcript, which it preceded with the comment that it is "the only testimony tending to establish *duress in the execution of this agreement,*" (italics ours) and concluded (with citations of federal cases only) that "there is no evidentiary support for a finding of duress."

Obviously, the Court below was under a duty to consider *all* the findings (27, 28, 29, 30, 31, 50 and 51 as well as 46) bearing on the duress in the respondents' *payments* to the Credit Union of the amounts deducted from the bankrupt's collections. Singling out one finding, alone immaterial, does not detract from a judgment which remains supported by other fact findings; and that a document, admittedly unsupported by any consideration at the time of its execution, is not in and of itself determinative that the deducted

collections were not diverted to the Credit Union under duress of the bankrupt.

Nor did the Court below consider whether there were any inferences which it would be under a duty reasonably to draw from the evidence in support of all findings in addition to Finding 46, and judgment of the trial court.

In quoting, as it did from Haberman's testimony, the court ignored his testimony at pages 164-5, 174-5, and 436 of the transcript. It overlooked Todd's confessed entire lack of memory (R. 581) and Talley's lame story (R. 750-1) on the subject of duress. It overlooked Haberman's testimony of his repeated objections and the respondents' responses that if he did not quit complaining they would "cut him off." It overlooked that the only loan at the time of the conversation in June, 1935, was one of $3,000 cash advanced in exchange for his $6,000 note and the uncontradicted representation that they would pay the other $3,000 to the Credit Union, of which payment there is no evidence. It overlooked that there were no other loans thereafter until January, 1936 and that admittedly nothing was given in exchange in August, 1935, for the authorization for payments to the Credit Union. It overlooked respondents' high-handed actions in their unproved settlement of October, 1938, and false claim of ownership of accounts receivable by virtue of an assignment made in 1935 expressly assigning only accounts of that earlier date, and their threats of criminal prosecution for plaintiff's disregard of the assignment, and completely overlooked the power of usurious creditors over a debtor in their clutches never daring to act independently for fear of inevitable bankruptcy from their interferences and delay in reprisal against his personal efforts at collection of his own accounts.

The alleged documents, notes and retractions were executed under circumstances of the continuing duress existing

between the parties, with bankruptcy at all times and ultimately the only alternative. To assert that, being admittedly executed, they are unchanging evidence of their content and therefore evidence of the absence of duress is to state a *non sequitur* and only to draw an inference contrary to one which was primarily within the province of the trial court reasonably to draw.

2. The alleged inconsistent statements of the bankrupt (satisfactorily explained to the trial court) were made before the referee and *after* the intervention of bankruptcy and were not admissions binding on the petitioner as trustee in bankruptcy. (*Burke* v. *National Liberty Ins. Co. of America*, 212 App. Div. 738, 209 N. Y. Supp. 608, and compare *In re Weissman*, C. C. A. 2, 19 F. (2d) 769, 772, *Brock* v. *Schradsky*, 6 Colo. App. 402, 404, and Bankruptcy Act, section 70A, U. S. C. Title 11, ch. 7, sec. 110a.)

Although *not* evidence of their subject matter (*Southern Railway Co.* v. *Gray*, 241 U. S. 333, *Southern Pacific Co.* v. *Kauffman*, C. C. A. 9, 50 F. (2d) 159, 161, and compare *Waldron* v. *Waldron*, 156 U. S. 361, 381), they were stressed by the court below.

They were admissible for purposes only of impeachment (which was unsuccessful), a matter hitherto exclusively within the province of the trial court. (*Lumbermen's Mutual Casualty Co.* v. *McIver*, C. C. A. 9, 110 F. (2d) 323, 325; *Bowen* v. *Cote*, C. C. A. 1, 69 F. (2d) 136, 137, 138; *U. S.* v. *Tyrakowski*, C. C. A. 7, 50 F. (2d) 766, 770; and *Johnson* v. *Ellmers*, C. C. A. 6, 295 Fed. 685.

"Clearly erroneous" in Rule 52(a) with its limitations of regard for the trial court's opportunity to judge of the credibility of the witnesses has not yet been defined much beyond the actual words of the rule. The rule does not serve as a warrant for a retrial; and we urge the need for this Court to fix its limit and scope on review at something

less than what the majority of the court below have attempted under it in this case.

3. The opinion of the majority of the court below sets forth the five items comprising the total judgment. The opinion orders a dismissal of the action, while disposing of only two, namely, the charges for the assurance agreement for the reinstatement of employees in Armour's employ and on its payroll, and the collections of the bankrupt diverted to the Credit Union. The three remaining items, included in the judgment and aggregating, exclusive of interest, $31,648.71, exceed the $20,226.79 of credits found to be due Todd and Talley by $11,421. 92, and with interest by $21,780.04. There is nothing in the opinion which discussess them, namely: the finding that Todd, Talley and the Bureau deducted $10,076.75 for alleged collection services in connection with Credit Union loans collected directly from Armour and Company, when such services were neither necessary nor performed; the finding that they admittedly (R. 46) collected $13,236.64 after October 1, 1938, on Haberman's accounts receivable which they claimed under an unproved settlement and under the assignment executed in 1935 which by its terms assigned only accounts as of that earlier date; and the finding that they received from Haberman new accounts receivable from sales made by him after October 1, 1938, in an amount exceeding by $8,335.32 the cash they paid him and which was no more than the proceeds of the collections of his very own accounts.

Nevertheless, the Court below reversed the entire judgment with directions to *dismiss the action.*

The incongruous result of this litigation, also justifying this court's review for the pronouncement of an exemplary rule, is that four judges have considered this case and are equally divided on the sufficiency of the evidence; and, yet,

the experienced and respected judge who actually heard and saw the witnesses and was the only one in the position to judge of their credibility and the true worth of their testimony, is overruled.

The case assumes greater importance, when it is considered that trustees in bankruptcy are too often confronted with transactions where the participants or dominant personalities have sought to create appearances conflicting with later discovered truth. To permit disregard of a trial court's opportunities of determining from the conduct and demeanor of the witnesses who is telling the truth and *whether it is being told in court at the trial,* despite explained extra-judicial inconsistent statements motivated at the time by selfish interests hostile to those of the trustee, is to place an unbearably difficult burden on trustees in bankruptcy seeking to effect recoveries in behalf of bankrupt estates in the administration of their official duties.

Conclusion.

It is respectfully submitted that review by this court is most essential, as under existing statutes the scope of review is for errors only of law, and is not enlarged by Rule 52a for correction of errors in fact. There is ample evidence to support a judgment and findings based on duress under the law of Illinois, if correctly determined. The application and interpretation of Rule 52a goes far beyond what can be the limitations and true meaning of the rule, and is in conflict with the decisions of other circuits. Resolving the conflict between the rule and statutes on federal appellate practice, resolving the conflict between the circuits, exposition of the limits of Rule 52a, and elim-

ination of the doubt cast on the Illinois law of actionable duress urgently require a review by this court; and the writs of certiorari should be granted.

Respectfully submitted,

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APPENDIX.

(U. S. C. Title 28, sec. 723b and 723c), Act of June 19, 1934, Ch. 651, 48 Stat. 1064.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, by general rules, for the district courts of the United States and for the courts of the District of Columbia, the forms of process, writs, pleadings, and motions, and the practice and procedure in civil actions at law.

SEC. 2. The court may at any time unite the general rules prescribed by it for cases in equity with those in actions at law so as to secure one form of civil action and procedure for both: *Provided, however,* That in such union of rules the right of trial by jury as at common law and declared by the seventh amendment to the Constitution shall be preserved to the parties inviolate. Such united rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session."

(U. S. C. Title 28, sec. 730), Revised Statutes, sec. 917.

"The Supreme Court shall have power to prescribe, from time to time, and in any manner not inconsistent with any law of the United States, the forms of writs and other process, the modes of framing and filing proceedings and pleadings, of taking and obtaining evidence, of obtaining discovery, of proceeding to obtain relief, of drawing up, entering and enrolling decrees, and of proceeding before trustees appointed by the court, and generally to regulate

the whole practice, to be used, in suits in equity or admiralty, by the circuit and district courts."

(U. S. C. Title 28, sec. 861a), Act of January 31, 1928, Ch. 14, 45 Stat. 54.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the writ of error in cases, civil and criminal, is abolished. All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

(U. S. C. Title 28, sec. 861b), Act of April 26, 1928, ch. 440, 45 Stat. 466.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 2 of an Act entitled, 'An Act in reference to writs of error,' approved January 31, 1928, Public Numbered 10, Seventieth Congress, be, and it is hereby, amended to read as follows:

> 'Sec. 2. The statutes regulating the right to a writ of error, defining the relief which may be had thereon, and prescribing the mode of exercising that right and of invoking such relief, including the provisions relating to costs, supersedeas, and mandate shall be applicable to the appeal which the preceding section substitutes for a writ of error.' "

(U. S. C. Title 28, sec. 875), U. S. Revised Statutes, sec. 700.

"When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the Supreme Court upon a writ of error or on appeal; and

when the finding is special the review may extend to the determination of the sufficiency of the facts found to support the judgment."

(U. S. C. Title 28, sec. 879), U. S. Revised Statutes, sec. 1011, as amended by Act of February 18, 1875, ch. 80, 18 Stat. 318.

"There shall be no reversal in the Supreme Court or in a circuit court upon a writ of error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, or for any error in fact."

(U. S. C. Title 28, sec. 773), Act of May 29, 1930, ch. 357, 46 Stat. 486.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 649 of the Revised Statutes, as amended (section 773, title 28, United States Code), be, and the same is hereby amended to read as follows:

> 'Sec. 649. Issues of fact in civil cases in any district court may be tried and determined by the court, without the intervention of a jury, whenever the parties, or their attorneys of record, agree to waive a jury by a stipulation in writing filed with the clerk or by an oral stipulation made in open court and entered in the record. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury.' "

(U. S. C. Title 28, sec. 225a), Act of February 13, 1925, ch. 229, 43 Stat. 936.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That sections 128 * * * of the Judicial Code as now

existing be, and they are severally, amended and reenacted to read as follows:

> 'Sec. 128(a). The circuit courts of appeal shall have appellate jurisdiction to review by appeal or writ of error final decisions—
>
> First. In the district courts, in all cases save where a direct review of the decision may be had in the Supreme Court under section 238. * * *' "

Act of March 3, 1891, ch. 517, 26 Stat. 826.

"Sec. 2. That there is hereby created in each circuit a circuit court of appeals, * * * which shall be a court of record with appellate jurisdiction, as is hereafter limited and established. * * *

"Sec. 6. That the circuit courts of appeals established by this act shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the district court * * * in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, * * *

"Sec. 11. * * * And all provisions in law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the methods and system of appeals, and writs of error provided for in this act in respect of the circuit courts of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit courts of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively."

Federal Rules of Civil Procedure.

Rule 52. Findings by the Court.

(a) Effect. In all actions tried upon the facts without a jury, the court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment; * * *. Requests for findings are not necessary for purposes of review. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses. * * *"